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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

This is an appeal by Charles W. Baker, *et al.* from an Order of February 4, 1960, entered in accordance with a *per curiam* Opinion of the District Court of the United States for the Middle District of Tennessee, as a three judge statutory Court specially invoked by virtue of the provisions of 28 U.S.C. § 2281. This Statement is submitted by Appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Opinion of the District Court of the United States for the Middle District of Tennessee is reported at 179 F. Supp. 824 (M. D. Tenn. 1959) and is attached to this Jurisdictional Statement as Appendix A, *infra* at page 27. The Order of the District Court is attached to this Statement as Appendix B, *infra* at page 34. The Opinion of District Judge William E. Miller is attached to this Statement as Appendix J, *infra* at page 48.

JURISDICTION

This suit was brought under 28 U.S.C. § 1343 (3) and (4); 42 U.S.C. §§ 1983 and 1988; and 28 U.S.C. §§ 2201-2202, seeking a declaratory judgment as well as an interlocutory and permanent injunction restraining the enforcement, operation, and execution of an Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 through 3-107 (1956).

The Opinion of the District Court was rendered on December 21, 1959 and its Order was entered on February 4, 1960. Notice of Appeal was filed in the District Court on March 29, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *United States* v. *Cruikshank*, 92 U.S. 542; *Nixon* v. *Herndon*, 273 U. S. 536; *Smiley* v. *Holm*, 285 U.S. 355; *Colegrove* v. *Green*, 328 U.S. 549; *Turman* v. *Duckworth*, 329 U.S. 675; *Cook* v. *Fortson*, 329 U.S. 675; *Terry* v. *Adams*, 345 U.S. 461; *Cooper* v. *Aaron*, 358 U.S. 1.

STATUTES INVOLVED AND CONSTITUTIONAL PROVISION

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956), which is set forth in Appendix C, *infra* at page 35. 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1983 and 1988 which are set forth in Appendix N, *infra* at page 59. The UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2, which is set forth in Appendix C, *infra* at page 37.

QUESTIONS PRESENTED

1. Whether a state statute which, in 1901, created an inequality of legislative representation and has been since retained by systematic and purposeful inaction through legislative refusal to obey the periodic reapportionment requirement of the State Constitution and the State constitutional guarantee of free and equal elections, is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution?

2. Whether the inequality of legislative representation created by this same State statute is also an abridgement of the right to vote guaranteed by Section 2 of the Fourteenth Amendment?

3. Whether the systematic discriminatory allocation of tax burdens and tax benefits created by the inequality of State legislative representation under this State statute is a denial of the equal protection of the laws and the due process of law guaranteed by the Fourteenth Amendment?

4. Whether a District Court of the United States is precluded by rulings of the United States Supreme Court from granting any form of relief where the District Court has found (a) that a State statute un-

equally apportions legislative representation in violation of a State Constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the State, (b) that in consequence the State Legislature is guilty of a clear violation of the State Constitution and of the rights of the plaintiff voters under the Federal and State Constitutions, and (c) that the evil is a serious one which should be corrected without delay?

5. Whether a Federal Court can, and is under obligation, to declare invalid a State statute which clearly denies equal voting rights to Appellants when both the State Constitution and the Fourteenth Amendment clearly require equal voting rights?

6. Whether in declaring such a State statute invalid, the Federal Court need inquire at this time into the ultimate political solution or whether the Court can assume such solution will be provided by the State?

7. Whether implementation of the declaration of invalidity is a question which need be determined now, or whether the determination of this question may be held in abeyance?

8. Whether Federal Courts are under an obligation to protect federally guaranteed voting rights with appropriate relief, including, if necessary, injunction to restrain enforcement of an unconstitutional State statute when it is clear that there is no other means of obtaining relief.

9. Whether the Civil Rights Act amendments of 1957 and particularly 28 U.S.C. 1343 (4) require the Federal Courts to grant relief where there is a violation of equal voting rights?

STATEMENT OF THE CASE

This action was brought by Appellants, qualified voters and taxpayers in the State of Tennessee, against

election officials under the Civil Rights Acts,[1] to invalidate a statute which denies the equal voting rights guaranteed to them by the Constitution of Tennessee[2] and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

The Tennessee Constitution requires an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties or districts according to the number of qualified voters.[3] The last Act reapportioning the number of legislators was passed in 1901.[4] This Act was violative of the state and Federal Constitutions at that time because an enumeration of qualified voters was not made and the actual number of qualified voters in the state was ignored. Furthermore, after 1911, the Act of 1901 was no longer a constitutional basis for the election of representatives and senators because a new enumeration of qualified voters as well as a new apportionment of representation in the General Assembly was required in 1911 and every ten years thereafter.[5] Each and every Tennessee legislature since 1901, including the legislature in office at the time the Complaint in this case was filed, has failed to reapportion the number of legislators required to be elected from the several counties and districts of the state. Systematically and purposefully, the General Assemblies elected since 1901 have

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[1] 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1952); 16 Stat. 144 (1870) as amended, 42 U.S.C. § 1988 (1952); 62 Stat. 932 (1944) as amended, 28 U.S.C. § 1343 (3) and (4) (1957).

[2] TENN. CONST., art. I, § 5 (1870).

[3] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

[4] Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101—3-107 (1956).

[5] TENN. CONST., art. II, §§ 4, 5 and 6 (1870).

defeated all bills proposing reapportionment of the legislature.[6]

The Appellants have on the average one-tenth (1/10) of a vote and here seek a full vote in choosing members of the state legislature. Other citizens of Tennessee have a full vote while still other members of a selected minority in the state have the equivalent of ten times the vote allowed the Appellants. The right to a full rather than a fractional vote is both recognized and guaranteed by the Fourteenth Amendment of the Federal Constitution and the Tennessee Constitution.[7] Significant state population changes since 1901 and the failure and refusal of the various Tennessee legislatures to reapportion themselves since that date have caused discrimination against the Appellants because their votes are nowhere near as effective as those of voters residing in other state counties and electoral districts. The geographical areas in which Appellants reside are experiencing an explosion in population growth, and the disenfranchisement will be intensified with the passage of time.

The record proves that the Act of 1901 violates the Tennessee and Federal Constitutions and has had the effect of conferring control of the State General Assembly upon a selected minority of the Tennessee voting population. A purposeful and systematic plan to discriminate against a geographical class of persons in their voting rights now exists in Tennessee by the continued enforcement of the statute here challenged.

The statute in issue has caused a denial of both equal protection of the laws and due process of law to Appel-

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[6] Exhibit I, Intervening Petition of Ben West, Mayor, entitled Historical Study, etc.

[7] Tenn. Const., art. I, § 5 (1870).

lants through the discriminatory allocation of tax burdens and the unequal and unjust distribution of funds derived from that taxation. State legislation is passed for the support of public schools, for the maintenance of roads, and highways, and for other purposes. The money collected as a result of such legislation is distributed by an unconstitutionally apportioned legislature through arbitrary, unreasonable and discriminatory formulas[8] to Tennessee county and municipal governments in proportion to their under or over representation in the General Assembly. For example, a voter in Moore County (with a population of 2340) has 23 times as much representation in the lower House as does a voter in Shelby County (with a population of 312,345), and Moore County receives 17 times the apportionment per vehicle of state gasoline and motor fuel taxes as does Shelby County. See Appendices F, G and H, *infra* at pages 41, 43, 45.

These discriminatory apportionment formulas directly affect the share in Federal tax moneys accruing to the several counties in which Appellants' reside because Federal grants-in-aid to the state for highway construction and other Federal purposes are made on a "fund matching basis." See Appendix I, *infra* at page 47.

Similar discriminatory practices exist in the allocation of sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes and other taxes. This situation in Tennessee is clearly a case of taxation without fair representation since it requires the unfavored many to pay higher taxes then the favored few.

A remedy which would contemplate direct action against the state legislature or its members requiring

[8] See Appendices D and E, *infra* at pages 39, 40.

them to reapportion membership in the legislature among the counties and districts has not been sought in this case. The District Court was asked to do three things: (1) to declare unconstitutional and to enjoin enforcement of the Act of Apportionment of 1901 and those provisions of the Tennessee Code which have further exaggerated its original inequalities, (2) to order an election at large without regard to the counties or districts, and (3) in the alternative, to direct the Appellees to hold an election in accordance with the formula for legislative representation provided in the State Constitution using the 1950 or subsequent federal census to determine the number of qualified state voters.

The District Court found that the issues presented in this case were "of such a character that they should be evaluated by a three-judge court." In referring the matter to the statutory court, District Judge Miller's Opinion of July 31, 1959, cited the difference between the case of *Colegrove* v. *Green,* 328 U.S. 549, and the case at bar. He pointed out that while there had been no violation of the Illinois constitution or any provision of federal law in the *Colegrove* case, *supra,* relief for inequitable legislative districting could have been obtained there from the United States Congress. Judge Miller said that absent judicial action there is no remedy at all in the Tennessee situation. His decision is set forth in Appendix J, *infra* at page 48.

A motion to dismiss was filed by the Appellees upon the grounds that the statutory Court did not have jurisdiction of the subject matter of the suit, that there had been a failure to state a claim upon which relief could be granted, and that certain alleged indispensable parties had not been joined. The case was heard by a three-judge Court on November 23, 1959.

The three-judge Court on December 21, 1959 in a *per curiam* Opinion, denied the relief prayed for by Appellants, stating:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay." Appendix A, *infra* at page 27.

On February 4, 1960, an Order dismissing the Complaint in this case was entered by the District Court on the grounds that the court lacked jurisdiction of the subject matter and that the Complaint failed to state a claim upon which relief could be granted. This appeal is from that final Order, pursuant to 28 U.S.C. § 1253.

THE QUESTIONS ARE SUBSTANTIAL

The instant appeal presents on the record herein one of the clearest denials of constitutional rights yet brought before this Court. The right to vote is the cornerstone of civil rights. The discrimination suffered by the Appellants is shocking to the conscience and violative of the guarantees of the Fourteenth Amendment to the Federal Constitution.

Because of its unique facts, this is a case of first impression. The validity of a state statute which grossly dilutes the right of a citizen to an equal vote and equal representation in the face of state constitutional commands requiring equal elections and equal representation (and thereby abridges rights under the Fourteenth Amendment) has never before been passed upon by this Court. The Act attacked in effect

prohibits equality of representation and prescribes the election of a majority of the legislature by a minority of the people of Tennessee. It thus repeals the commands of the State constitution.

The record in this appeal makes it unmistakeably clear that all avenues for relief (other than this Court) are closed to the Appellants because of the unique circumstances which exist in Tennessee. All remedies through state legislative, executive, and judicial avenues are closed to Appellants. The record proves this beyond dispute. Unless this Court acts to end a flagrant instance of State interference with Federal rights, there will never be a restoration of full voting rights for Appellants and all others similarly situated nor will there be a termination of its related circumstances.

The Court is here urged to correct one of the most vicious malignancies in American government.* The issues involved directly affect millions of American citizens who are now deprived of rights guaranteed by our Federal Constitution.

This case therefore presents not only the inequalities in Tennessee legislative representation, but the inequalities in legislative representation throughout the United States. It pleads for judicial aid as the means of preserving a liberty basic to a democratic form of government, that is, the right to vote and have one's vote counted equally with that of other voters.

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* Fleming, *America's Rotten Borough*, Nation Magazine, January 10, 1959, Vol. 188, p. 26.

Kennedy, *The Shame of the States*, N. Y. Times, May 18, 1958, § 6 (Magazine) p. 12.

Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L Rev. 1057 (1958).

Strout, *The Next Election is Already Rigged*, Harper's Magazine, November 1959, Vol. 219, p. 25.

This Court on March 22, 1960 granted certiorari in the case of *Gomillion* v. *Lightfoot*, 270 F. 2d 594 (5th Cir., 1959) which is concerned with a state legislative alteration of a municipality's boundaries to impair the voting rights of a group of Negroes. There is no substantive difference between the deprivation of the right to vote in Tuskegee municipal elections and the refusal to count at full value votes cast by hundreds of thousands of Negroes and whites in certain Tennessee counties and districts at a state election. Minority decisions in both *Colegrove* v. *Green*, 328 U.S. 549, and *South* v. *Peters*, 339 U.S. 276, found no basis for distinguishing the latter cases from other cases involving the rights of Negroes.

Judicial failure to act under the circumstances of this case cannot be justified by any precedent of law or equity. As stated in the Opinion of Judge William E. Miller, Appendix J, *infra* at page 48.

> "In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.
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> "If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate

the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen."

I

THE TENNESSEE STATUTE IS UNCONSTITUTIONAL BECAUSE, CONTRARY TO LAW, IT REQUIRES UNEQUAL LEGISLATIVE REPRESENTATION AND CAUSES CROSS DISCRIMINATION IN STATE VOTING RIGHTS.

A. The Tennessee Voting Right is Diluted By Fractional Representation In Direct Violation of the Fourteenth Amendment.

Unquestionably, the failure of the Tennessee legislature since 1901 to take the action required of it has resulted in the giving of a full vote or better to a minority of state voters and a fraction of a vote to a majority of state voters. This action has caused a denial of the equal protection of the laws to the Appellants as much so as if discrimination had occurred because of race, color, or creed. As plainly stated by a minority of this Court in *South* v. *Peters*, 339 U.S. 276:

> "It is said that the dilution of plaintiff's votes . . . is justified . . . If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon*, which have insisted that where there is voting there be equality . . . (T)here shall be no inequality in voting power by reason of race, creed, color, or other invidious discrimination." 339 U.S. at 281.

Geographical discrimination and racial discrimination are equally onerous. Although the Federal constitution does not give rise to the individual citizen's right

to vote, since this franchise springs from the individual states themselves, *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162; *McPherson* v. *Blacker*, 146 U.S. 1, nonetheless, where state law grants such a right, each citizen must be equally protected in the operation of that law. *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Cruikshank*, 92 U.S. 542. The Tennessee Constitution grants the full right of suffrage to Appellants. There can be no dilution by the state of that right to vote through the medium of fractional representation for certain voters and full representation for other voters. *United States* v. *Mosley*, 238 U.S. 383; *Nixon* v. *Herndon*, 273 U.S. 536; *United States* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649; *United States* v. *Saylor*, 322 U.S. 385; *Terry* v. *Adams*, 345 U.S. 461.

Otherwise, and this is now the case in Tennessee, an elective franchise to all intents and purposes is lost. An unequal voice in elections and a complete denial of participation in an election are of the same offensive order. Because of great changes in the population of Tennessee Counties as indicated in Appendix K, *infra* at page 54, the existing legislative apportionment has become progressively discriminatory in character.

The Tennessee Constitution requires a specific reapportionment every ten years. Various legislatures, including the one presently in session, have adamantly refused to pass a valid apportionment statute for these sixty-odd years. Because of this complete disregard for the commands of the Tennessee Constitution, Shelby County now lacks seven Representatives and two Senators; Davidson County now lacks three Representatives and a Senator; and Knox County and Hamilton County now lack three Representatives and a Senator to which each of these counties is constitutionally entitled.

As shown by Appendix F, *infra* at page 41, population changes and certain amendments to the Act of 1901 by the year 1950, as reflected by the Census of the United States population taken in 1950, found twenty-three Tennessee counties possessed of twenty-five direct representatives when their voting population entitled them to only two direct representatives. As of the year 1950, ten Tennessee counties, as shown in Appendix F, *infra* at page 41, although entitled to forty-five direct representatives under the State Constitutional formula, actually had only twenty direct representatives. Similar disparity in the voting population of the Senatorial districts is indicated in Appendix L, *infra* at page 55, as reflected by the 1950 census. The over-represented counties, on a *per capita* basis, are allowed a 500% participation in state shared funds, as compared to under-represented counties. See Appendix M, *infra* at page 57.

The overall result of this discrimination is that 37% of the qualified voters in Tennessee elect twenty of the thirty-three members of the State Senate, and 63% elect but thirteen members of the Senate. In the Tennessee House of Representatives, 40% of the voters elect sixty-three of the ninety-nine members of the House, while 60% of the voters elect only thirty-six members of the House. No Bill seeking to reapportion since 1901 has received more than 13 votes in the State Senate nor more than 36 votes in the House.

B. The Validity of A State Statute Violating State Constitutional Guarantees of Equal Voting Rights And Abridging Federal Constitutional Rights Presents A Question Which Has Not Been Determined By This Court.

A state statute which dilutes the right of a citizen to an equal vote in the face of state constitutional com-

mands requiring equal representation and free and equal elections, and which thereby abridges rights under the Fourteenth Amendment, has never before been passed upon by this Court.

The case at bar is distinguishable from *Colegrove* v. *Green, supra.* Whereas the plaintiffs there contended that the Illinois congressional apportionment law deprived them of constitutional rights to equal representation, the Court found that the act [10] governing redistricting for Federal representation contained no requirements as to compactness, contiguity or equality in the population of Congressional districts. In neither the *Colegrove* case nor its predecessor, *Wood* v. *Broom,* 287 U.S. 1, was there a declared policy of representation or equal voting rights, in organic or statutory law. Tennessee's 1901 Apportionment Act violates a specific constitutional command couched in language depriving the legislature of any "political" discretion to deviate from the command.

McDougal v. *Green,* 335 U.S. 281, was only concerned with a claim which had been made by a political party that an Illinois statute denied rights under the Fourteenth Amendment. The statute required that a petition to form and nominate candidates for a new political party be signed by a representative group of qualified voters encompassing at least 50 of the state counties.

In *South* v. *Peters, supra,* this Court held that the lower court had properly dismissed a suit to set aside the Georgia county unit vote in connection with a primary election involving United States Senators. The lower Federal Court had decided that under the Georgia

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[10] 46 Stat. 26 (1929) (later amended by 54 Stat. 162 (1941), 2 U.S.C. § 2a (1959).

Constitution there was no guarantee of a substantially equal vote in such an election. Clearly the *South* case could not have presented or decided the constitutional issue in the case at bar.

Thus, in the leading cases on voting rights as well as in other similar cases before this Court both prior and subsequent to *South* v. *Peters, supra,* the issue of the constitutionality of a reapportionment act under the circumstances now existing in Tennessee has remained undecided.[11] This Court has not yet reached that constitutional question.

In the case at bar, the 1901 Act of Apportionment, applies to rural, sparsely settled counties and to populous counties a numerical formula which completely ignores the state constitutional requirement of representation based upon population. The result is an abridgement of the right to vote for members of the state legislature, and a denial of the equal protection of the laws, under the Fourteenth Amendment. A large-scale dilution of political rights has occurred in Tennessee through an obviously discriminatory practice. It is of the greatest importance that this Court now lend its support to terminate injustices which if permitted would continue indefinitely in Tennessee.

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[11] *Hartsfield* v. *Sloan,* 357 U.S. 96.
Kidd v. McCanless, 352 U. S. 920.
Radford v. *Gary,* 352 U. S. 991.
Anderson v. *Jordan,* 343 U.S. 912.
Cox v. *Peters,* 342 U.S. 936.
Remmey v. *Smith,* 342 U.S. 916.
Colegrove v. *Barrett,* 330 U.S. 804.
Cook v. *Fortson,* 329 U.S. 675.
Turman v. *Duckworth,* 329 U.S. 675.
Wood v. *Broom,* 287 U.S. 1.

II

RESTORATION OF A FULL VOTING RIGHT AND AN END TO DISCRIMINATION CAN ONLY BE ACHIEVED WITH ASSISTANCE OF THIS COURT BECAUSE APPELLANTS HAVE EXHAUSTED ALL AVENUES OF RELIEF.

Appellants present here a case and controversy where a federally guaranteed right has been violated and where it is obvious under the circumstances that no relief can ever be obtained unless this Court intervenes.

A. The Tennessee Legislature has Refused to Act.

Historical data in the record shows that for over half a century the Tennessee General Assembly has refused to rectify its unlawful composition to afford Appellants and other persons similarly situated their lawful voting rights. It is no longer reasonable to expect that those who benefit, and who control the state legislature, by reason of an unlawful apportionment will of their own volition relinquish the advantage or terminate the control.

B. The Highest Court of the State Has Refused to Act.

In *Kidd* v. *McCanless,* 200 Tenn. 282, 292 S.W. 2d 40 (1956), *appeal dismissed* 352 U.S. 920, the Tennessee Supreme Court failed to hold that the 1901 Act of Apportionment was unconstitutional and denied declaratory and injunctive relief.[12] The Tennessee Constitution does not provide for initiative or referendum action by state citizens to correct the abuse which has

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[12] This decision nullified the remedy proposed to be given by the Chancery Court of Tennessee.

been sustained by Appellants. A state Constitutional Convention is not an available remedy to correct the injustice now being perpetuated because such a Convention could only be called by a majority vote of two successive General Assemblies,[12] and that vote could never be obtained from the legislature as it is now constituted. All such proposals have for sixty years been rejected. Even if such a Convention were held, its delegates would be chosen in an unrepresentative manner reflecting the present legislative apportionment. The governor has no authority to assemble a constitutional convention.

Tennessee voters such as the Appellants are *in extremis*. The utter lack of remery makes the Appellants' cause unique. In *Colegrove* v. *Green, supra,* the Court expressed the view that recourse to the Congress of the United States was possible to correct the inequities in a congressional reapportionment act. The same remedy was also available in *Wood* v. *Broom, supra,* which was relied upon in the *Colegrove* case. In Oklahoma, as evidenced by *Radford* v. *Gary,* 145 F. Supp. 541 (W. D. Okla. 1956), *affirmed without opinion,* 352 U.S. 991, the state constitution contains initiative and referendum provisions. In *Remmey* v. *Smith,* 102 F. Supp. 708 (E. D. Penn. 1951) *appeal dismissed for want of a substantial federal question,* 342 U.S. 916, a remedy was said to be available in the state courts of Pennsylvania. A local judicial remedy was also available in *Perry* v. *Folsom,* 144 F. Supp. 874 (N. D. Ala. 1956).

A refusal by this Court to act in the Tennessee situation will permit the continuation of a shocking violation of Federal Constitutional guarantees, as well as

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[12] Tenn. Const., art. XI, § 3 (1870).

a degeneration of the very principles upon which representative government in the United States is grounded.

III

THIS COURT HAS JURISDICTION OVER A CASE INVOLVING THE DENIAL OF STATE VOTING RIGHTS BY STATE ACTION UNDER COLOR OF LAW.

This Court's reluctance to grant equitable relief in *South* v. *Peters*, 339 U.S. 276, must not be construed as being based upon a lack of jurisdiction over the subject matter of state voting rights or upon the constitutional doctrine of separation of powers.[14] This Court has in many instances assumed jurisdiction where political rights, such as the right to vote, were in issue.

This was clearly true in *Colegrove* v. *Green, supra*, where a majority of the justices believed that *Smiley* v. *Holm*, 285 U.S. 355, had decisively determined the right to seek judicial review of a state act regarding legislative representation where it was questioned whether state constitutional requirements essential to the validity of the act had been met.

The holding in *Colegrove* v. *Green, supra*, was aptly summarized by Mr. Justice Rutledge in *Turman* v. *Duckworth*, 329 U.S. 675, as follows:

> "A majority of the Justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."
> 329 U.S. at 678

[14] This Court held that Federal Courts consistently refuse *to exercise* the equity powers of which they are possessed in cases pertaining to a state's geographical distribution of electoral strength among its political subdivisions.

The point that cases involving the right to vote are justiciable is clearly shown in *MaDougal* v. *Green, supra,* where there was unqualified assumption of jurisdiction, and in *South* v. *Peters, supra,* where a simple majority of this Court refused to exercise its equity powers, but did not disclaim the case on purely jurisdictional grounds.

While there may be some confusion in lower court cases attempting to distinguish between jurisdiction and remedy in situations involving state voting rights, the foregoing cases concerned with fractional representation buttressed by substantial authority in the area of voting discrimination should dispose of any contention that the case at bar is outside the jurisdiction of this Court.[15]

IV

THIS COURT SHOULD EXERCISE ITS EQUITY JURISDICTION UNDER THE SPECIAL CIRCUMSTANCES OF THIS CASE—A BASIS FOR SUCH ACTION IS PROVIDED BY CASE PRECEDENT AND THE CIVIL RIGHTS ACTS.

There are several cases such as *Smiley* v. *Holm, supra,* and *Rice* v. *Elmore,* 165 F. 2d 387 (4th Cir. 1947) *cert. denied* 333 U.S. 875, were declaratory and injunctive relief has been exercised to protect the right of American citizens to vote. As stated in *Snowden* v. *Hughes,* 321 U.S. 1, the right to relief under the Fourteenth Amendment is not diminished by the fact that the discrimination in question relates to political rights.[16] As this Court stated in the case of *Cooper* v. *Aaron,* 358 U.S. 1:

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[15] *Nixon* v. *Herndon,* 273 U.S. 536; *Terry* v. *Adams,* 345 U. S. 461.

[16] See also *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; and *Smith* v. *Allwright,* 321 U.S. 649, where this Court has exercised jurisdiction over suits at law for damages arising from a deprivation of the federally protected right of suffrage.

> ". . . The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a States government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." 358 U.S. at 16-17.

The question before this Court is whether or not a declaratory judgment and injunctive relief be granted where state voting rights have been abridged under color of law in violation of the Fourteenth Amendment in a particular set of circumstances never before considered by this Court. Whereas other voting rights cases have contained only an argument (albeit a good argument) that there was unfairness in legislative representation, the Tennessee Constitution in the case at bar *requires* fair representation pursuant to free and equal elections. Whereas other voting rights cases have contained some ostensible avenue of alternative redress, the case at hand is completely devoid of such possibilities.

28 U.S.C. § 2201 provides for a declaration of the rights of interested parties where a case presents justiciable issues.[17] It is submitted that such issues exist in the case at bar.

The specific means of enforcing the Appellants right in equity is granted by 42 U.S.C. § 1983, *supra,* in conjunction with 28 U.S.C. § 1343(4) *supra,* both printed in Appendix N, *infra,* at page 59. In Part III

[17] *Altvater* v. *Freeman,* 319 U.S. 359

of the Civil Rights Act of 1957, specifically, 28 U.S.C. 1343(4), Congress has unequivocally provided for equitable relief in cases involving the right to vote. The language of this provision is quite clear. It states that the district courts shall have original jurisdiction of any civil action:

> "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" [emphasis added]

The coordinate effect of these several statutes is to provide ample procedural and substantive authority for this Court to exercise declarative and equitable jurisdiction and thereby restore to Appellants their right to vote bestowed by the Tennessee Constitution and guaranteed by the Fourteenth Amendment.[18]

With the added impetus of 28 U.S.C. § 1343(4), Federal Courts are no longer justified in refusing to exercise equity jurisdiction as in *Giles* v. *Harris,* 189 U.S. 475, and in *South* v. *Peters, supra.*

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[18] In the recent racial segregation case, *Willie* v. *Harris County, Texas,* 180 F. Supp. 560 (S.D. Tex. 1960), plaintiff sought an action for declaratory judgment and permanent injunction to restrain county authorities, and relied upon 28 U.S.C. §§ 1331 and 1343 in conjunction with 42 U.S.C. §§ 1981 and 1983. The court found that the action was brought prematurely but did not dismiss the case for want of jurisdiction. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

V

VOTING INEQUALITY IN TENNESSEE CAN BE TERMINATED WITHOUT DIFFICULTY THROUGH INITIAL USE OF ONE OF SEVERAL PRELIMINARY ALTERNATIVE STEPS.

We are confident that this Court will have no difficulty in accepting the finding of the three-judge District Court below that Appellants' constitutional rights have been violated, and that the only problem is achieving the corrective action. In this connection we are mindful that *Colegrove* v. *Green, supra,* and *McDougal* v. *Green, supra,* indicate the concern of this Court for practical considerations when relief is sought in cases involving voting rights. In actuality, it is very likely that voting inequality in Tennessee could be terminated without encountering the difficulties anticipated in these cases. This has been shown to be true in Minnesota where citizens obtained a declaration from a three judge District Court in *McGraw* v. *Donovan,* 163 F. Supp. 184 (D. Minn. 1958) after which the state legislature promptly assembled and reapportioned its seats. Similarly, citizens of Hawaii found the United States Congress respectful of a declaration by a District Court in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii 1956).

A step-by-step approach by this Court utilizing certain alternative forms of relief is both feasible and important in the case at bar. It is almost certain that a declaratory judgment, by this Court or by the District Court, which invalidated the Tennessee Reapportionment Act of 1901 would prompt the state legislature to pass the required electoral redistricting Act.[19] Faced

[19] Jurisdiction would be retained by the Court until suitable action was taken.

with such a declaration, it is apparent that the Tennessee legislature would not assume the risk of functioning as it has in the past because by doing so it would jeopardize the future validity of its numerous fiscal, economic, social, and political programs.

It is possible that this Court may be reluctant to issue a declaratory judgment because of the Tennessee Supreme Court decision in *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d. 40 (1956). In our view the Court would not be bound to accept the finding in the *Kidd* case, *supra*, that an invalidation of the 1901 Act of Apportionment would prevent the state legislature from functioning in a *de facto* capacity to provide for a new reapportionment.[20] Furthermore Tennessee's Supreme Court, in part, placed its refusal to act on the failure of the complainants to point to a prior valid Act of Apportionment.[21]

If the Court is inclined to follow, or at the initial stage not dispute, the reasoning of *Kidd* v. *McCanless*, *supra*, there are two other forms of preliminary relief which it could grant. The Court could enjoin state election officials from holding any future election under the Act of 1901.[22] As in the case of declaratory judgment, this form of injunctive relief is almost certain to evoke corrective action by the Tennessee legislature

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[20] *Hanover Fire Insurance Co.*, v. *Carr.*, 272 U.S. 494, 509.

[21] This reasoning implies that the existence of a state legislature depends upon some act of apportionment validly enacted by it in spite of TENN. CONST., art II, § 9 which declares that the legislature "shall be dependent upon the people".

[22] This form of relief is not similar to that sought in *Perry* v. *Folsom*, 144 F. Supp. 874 (W.D. Ala. 1956), or *Remmey* v. *Smith*, 102 F. Supp. 708 (E.D. Penn). In those cases, affirmative remedies were sought against the legislature and executive branches themselves to force and require the passage of reapportionment statutes.

without there being encountered the legal difficulty envisioned in the *Kidd* case, *supra,* regarding the effects of a declaratory judgment.

As another alternative preliminary step the Court could affirm the District Court's finding that a violation of the Appellants' rights had occurred, and announce its intention to consider at a future date, if necessary, the question of relief. The Court would not initially decide whether declaratory or injunctive relief should be granted. The interval of time permitted by the Court would be sufficient to permit the General Assembly of Tennessee the opportunity to reconsider and act upon a lawful reapportionment.

The latter alternative is a course of action preferred by the Appellants because it may eliminate entirely any necessity for considering the grant of future judicial relief. However, if the need for such relief is not eliminated, this Court would then hear counsel for the parties to determine with specificity the form of equitable or declaratory relief. Whether the result would entail a directive to state election officials (by this Court or by the District Court) for an election at large, or for a revision, in accordance with the 1950 census of the numbers of legislators to be elected from each county and district or other form of remedy, could properly be considered at that time.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal from a judgment denying a state voting right granted by the Tennessee Constitution and guaranteed by the United States Constitution.

Respectfully submitted,

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APPENDIX A

Received for entry 9:25 A.M. December 21, 1959.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES BAKER ET AL., PLAINTIFFS,

v.

JOE C. CARR ET AL., DEFENDANTS

Before: MARTIN, Circuit Judge, and BOYD and MILLER, District Judges

PER CURIAM. The original plaintiffs and intervening plaintiffs citizens and qualified voters residing in different areas of Tennessee, seek to challenge in this action under the equal protection and due process clauses of the Fourteenth Amendment the existing legislative apportionment in Tennessee. Briefly summarized, the contentions of the plaintiffs [1] are as follows:

The Constitution of Tennessee (Article 2, Sections 4, 5 and 6) directs the legislature at the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the members of the legislature among the several counties or districts according to the number of qualified voters therein. It provides for 99 members of the House of Representatives and 33 members of the Senate. Despite the mandatory requirements of the state constitution, no reapportionment has been enacted by the legislature since the Act of 1901, and even that Act was passed without the enumeration of voters required by the Constitution of the State. Although persistent demands

[1] In this opinion the term "plaintiffs" will include both the original plaintiffs and the intervening plaintiffs. After the original complaint was filed other parties were allowed to intervene as plamtiffs, including the Mayor of the City of Nashville.

have been made upon the legislature to reapportion the state for Legislative purposes in accordance with the constitutional command, and although numerous bills have been introduced in the legislature to accomplish this purpose, the distribution of legislative seats remains as provided for in the Act of 1901. Such legislative distribution is grossly disproportionate to the distribution of population in the state, a condition brought about by shifts or changes in population since 1901. The inevitable result of this violation of the constitutional mandate is a gross inequality of legislative representation, a debasement of the voting rights of large numbers of citizens, and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. Illustrating the inequality, it is pointed out that a minority of approximately 37 per cent of the voting population of the state now controls 20 of the 33 members of the Senate. It is further alleged that such inequality of representation has resulted in continuous and systematic legislative discrimination against the plaintiffs and others similarly situated with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power, notably funds for the support of the public schools, the maintenance of roads and highways and other purposes.

Named as defendants in the action are the Secretary of State, the Attorney General, the Co-Ordinator of Elections, and the Members of the State Board of Elections. No remedy is sought by the plaintiffs which would contemplate direct action against the state legislature or its members to require them to reapportion the legislative districts. Specifically, the plaintiffs request that the Court declare unconstitutional the legislative Reapportionment Act of 1901 as well as the Code provisions of Tennessee implementing that Act as being violative of the equal protection and due process clauses of the Fourteenth Amendment, and that the Court then either (a) require by injunction that the defendants take necessary steps to hold an election by means of which the members of the next legislature would be elected from the state at large without regard to counties or districts, or (b) direct the defendants to hold an election by means of which the members of the legislature would be elected from counties and districts in accordance with the constitutional formula by applying mathematically the federal census of 1950.

The action is presently before the Court upon the de-

fendants' motion to dismiss predicated upon three grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court.

The question of the distribution of political strength for legislative purposes has been before the Supreme Court of the United States on numerous occasions. From a review of these decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment. Colegrove v. Green, 328 U. S. 549; Cook v. Fortson and Turman et al. v. Duckworth, 329 U. S. 675; Colegrove v. Barrett, 330 U. S. 804; McDougal et al. v. Green, 335 U. S. 281, South et al. v. Peters, 339 U. S. 276 Remmey v. Smith, 342 U. S. 916; Anderson v. Jordan, 343 U. S. 912; Kidd v. McCanless et al. 352 U. S. 920; Radford v. Gary, 352 U. S. 991.

In view of this array of decisions by our highest court, charting the unmistakable course which this Court must pursue in the instant case, it is unnecessary to consider decisions by lower federal courts. It is significant to point out that the case of Kidd v. McCanless, supra, involved the identical apportionment statutes and the identical state of facts with respect to apportionment of representatives in Tennessee, as the present action, the appeal in that case by the plaintiffs from the adverse decision of the Supreme Court of Tennessee being dismissed by the Supreme Court of the United States upon the authority of Colegrove v. Green, supra, and Anderson v. Jordan, supra. Moreover, the facts in the recent case of Radford v. Gary, supra, decided February 25, 1957, are substantially parallel to the facts of the present case. The plaintiffs attacked the existing legislative apportionment in Oklahoma, alleging inequalities in legislative representation and a consequent violation of the equal protection clause of the Fourteenth Amendment. The relief sought was not only a mandatory injunction against the members of the legislature, but in the alternative that the members of the legislature be elected at large until constitutional reapportionment could be effected. A Three-judge federal district court dismissed the action (Radford v. Gary, 145 F. Supp. 541) and the Supreme Court of the United States affirmed the judgment of the district

court by a per curiam opinion upon the authority of Colegrove v. Green, supra, and Kidd v. McCanless, supra. The Court can find no way in the present case to escape the compelling authority of this ruling as well as the other rulings of the Supreme Court herein cited.[2]

The wisdom and soundness of the non-intervention rule consistently followed by the Supreme Court is strikingly pointed up when the question of an appropriate judicial remedy is considered. As stated, the plaintiffs do not even insist that the Court could or should take any direct action against the legislature itself, by mandamus or otherwise, to compel the individual members of the legislature to perform their constitutional duties to reapportion the state legislative seats. The suggested remedies are indirect in character. Kidd v. McCanless, 200 Tenn. 273, affirmed by the Supreme Court of the United States in Kidd v. McCanless, supra, holds that a declaration of unconstitutionality of the existing apportionment statute of Tennessee, without more, would result in a destruction of the state government itself, since the de facto doctrine would not be applicable to maintain the present members of the legislature in office and there would be no prior valid apportionment act to fall back upon. In view of this decision, the plaintiffs recognize that the Court, if it declared the existing apportionment statute unconstitutional, would be required to go further and devise an appropriate remedy so as to avoid a disruption of state government. However, the remedies suggested by the plaintiffs are neither feasible nor legally possible.

The alternative of an election at large is met with a number of insuperable objections. First, the Constitution of Tennessee specifically provides for the election of members of the legislature from counties and districts, and no provision whatever is made for a legislature composed of members elected at large.[3] It is true that the Constitution pro-

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[2] The duty of the court to refuse intervention is not changed by allegations to the effect that various tax proceeds are allocated upon a discriminatory basis. Even if such general allegations could be accepted as showing specific results of existing legislative apportionment, they do not change the essential character of the controversy or the fundamental bases of the Supreme Court ruling refusing intervention.

[3] Smiley v. Holm, 285 U.S. 355, and Koenig v. Flynn, 285 U.S. 375, relied on by plaintiffs for ordering an election at large both

vides that the legislature of the state is "dependent upon the people" but the power to direct an election at large cannot be inferred from such general language in the face of specific provisions for election from districts. Practical considerations also are heavily weighed against such a remedy. It would lead to serious geographical inequalities and other discriminations, probably to a greater extent than those presently existing. It would require the Court not only to provide for the supervision of the entire election but also to devise detailed rules and regulations under which such election should be held, a task which the courts are not equipped to undertake. Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate. An election at large, directed by the Court, would indeed inject the Court into a "political thicket," as stated in Colegrove v. Green, supra.

Equally objectionable would be an election held on the basis of an enumeration of voters in the various counties and districts of the state determined by the Court by applying the last federal census. The Constitution of the state vests the duty of making the enumeration in the legislature and not in the courts. Moreover, the redistricting of the state is required to be based upon an enumeration of the qualified voters and not upon population alone. The Court would have no way of knowing the number of qualified voters in the various districts. Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state.

It is strenuously argued by the plaintiffs that the case alleged in the complaint is one involving a clear violation of their individual rights guaranteed by the Fourteenth Amendment, and for this reason that the Court should in some way overcome its reluctance to intervene in matters of a local political nature and formulate a remedy which would adequately protect their rights. It is insisted that the wrong committed against them by the failure and refusal of the state legislature to abide by the state constitution is clear

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dealt with the election of congressional representatives under a federal act providing for the election of representatives at large under certain conditions, and these cases are not in point here.

and unmistakable and that the courts should not leave such wrong without a remedy. With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. Some examples of such rights not appropriate for judicial relief were set forth by Mr. Justice Frankfurter in his opinion in Colegrove v. Green, supra.

> "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' Art. IV, Sec. 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But fulfillment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson* 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." (p. 556)

Being of the opinion that the Court has no right to intervene or to grant the relief prayed for, it is unnecessary to discuss the further ground of the motion that the action must fail because of the nonjoinder of indispensable parties as defendants.

An order will be submitted dismissing the action in accordance with this opinion.

/s/ JOHN D. MARTIN,
United States Circuit Judge.

/s/ MARION S. BOYD,
United States District Judge.

/s/ WILLIAM E. MILLER,
United States District Judge.

APPENDIX B

Received for entry 11:30 A.M. February 4, 1960.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES BAKER, ET AL., PLAINTIFFS,

vs.

JOE C. CARR, ET AL., DEFENDANTS

ORDER DISMISSING COMPLAINT

This cause was heard on the original complaint, the intervening petitions and the amended intervening petition of Ben West, Mayor of the City of Nashville, in accordance with the per curiam opinion heretofore filed; in conformity with said per curiam opinion the first two grounds of defendants' motion to dismiss (1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted, are sustained, defendants' motion to dismiss is granted, and the complaint is hereby dismissed.

Enter, this 5th day of February, 1960.

Approved for entry:

DENNY, LEFTWICH & OSBORN
For all Plaintiffs and Intervenors

____, ____,
For Defendants.

JOHN D. MARTIN,
United States Circuit Judge.

MARION S. BOYD,
United States District Judge.

WILLIAM W. MILLER,
United States District Judge.

APPENDIX C

The Statute Involved and Constitutional Provision

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now Tenn. Code Ann. §§ 3-101 to 3-107 (1956):

§ 3-101. *Composition—Counties electing one representative each.*—

The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Summer, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E. S.) ch. 5, Section 1; 1881 (E. S.), ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Shan., Sec. 123; Acts 1919, ch. 147; Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

§ 3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

§ 3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901, ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

§ 3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch. 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

§ 3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives. (Acts 1901, ch. 122, section 6; Shan., section 126a1; Code 1932, section 144.)

§ 3-106. *Joint representatives.*—The following counties, jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.
Second district—Sullivan and Hawkins.
Third district—Washington, Greene and Unicoi.
Fourth district—Jefferson and Hamblen.
Fifth district—Hancock and Grainger.
Sixth district—Scott, Campbell and Union.
Seventh district—Anderson and Morgan.
Eighth district—Knox and Loudon.
Ninth district—Polk and Bradley.
Tenth district—Meigs and Rhea.
Eleventh district—Cumberland, Bledsoe, Sequatchie, VanBuren and Grundy.
Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.
Fourteenth district—Summer, Trousdale and Macon.
Fifteenth district—Davidson and Wilson.
Seventeenth district—Giles, Lewis, Maury and Wayne.
Eighteenth district—Williamson, Cheatham and Robertson.
Nineteenth district—Montgomery and Houston.
Twentieth district—Humphreys and Perry.
Twenty-first district—Benton and Decatur.
Twenty-second district—Henry, Weakley and Carroll.
Twenty-third district—Madison and Henderson.
Twenty-sixth district—Tipton and Lauderdale.
Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

§ 3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.

Second district—Sullivan and Hawkins.
Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.
Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.
Fifth district—Knox.
Sixth district—Knox, Loudon, Anderson and Roane.
Seventh district—McMinn, Bradley, Monroe, and Polk.
Eighth district—Hamilton.
Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.
Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.
Eleventh district—Marion, Franklin, Grundy, and Warren.
Twelfth district—Rutherford, Cannon, and DeKalb.
Thirteenth district—Wilson and Smith.
Fourteenth district—Sumner, Trousdale and Macon.
Fifteenth district—Montgomery and Robertson.
Sixteenth district—Davidson.
Seventeenth district—Davidson.
Eighteenth district—Bedford, Coffee, and Moore.
Nineteenth district—Lincoln and Marshall.
Twentieth district—Maury, Perry and Lewis.
Twenty-first district—Hickman, Williamson and Cheatham.
Twenty-second district—Giles, Lawrence and Wayne.
Twenty-third district—Dickson, Humphreys, Houston and Stewart.
Twenty-fourth district—Henry and Carroll.
Twenty-fifth district—Madison, Henderson and Chester.
Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.
Twenty-seventh district—Gibson.
Twenty-eighth district—Lake, Obion, and Weakley.
Twenty-ninth district—Dyer, Lauderdale and Crockett.
Thirtieth district—Tipton and Shelby.
Thirty-first district—Haywood and Fayette.
Thirty-second district—Shelby.
Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

APPENDIX D

Formula for Apportionment of State Gasoline and Motor Fuel Tax

Source:

Intervening Complaint of Ben West, Mayor, City of Nashville, Tennessee, Section XVIII.

". . . of the seven cents (7¢) collected by the State for the storage and sale of each gallon of gasoline, "a sum equal to that derived from the levy of two cents for each gallon" is paid into a separate fund known as "County Aid Funds", Section 54-403 of the Tennessee Code Annotated providing for the distribution of this fund in the following language:

> "Said 'county aid fund' so derived from the two cents (2¢) gasoline privilege tax, shall be derived and distributed by the department of highways and public works to the various counties of the state as follows: One-half (½) of said fund shall be distributed equally among the ninety-five (95) counties of the state, and fifty percent (50%) of the balance shall be distributed among the ninety-five (95) counties on the basis of area and fifty per cent (50%) on basis of population, as of the most recent federal census, and shall be paid over monthly by the director of accounts of the state to the various county trustees, to be used by the county highway authorities in the building, repairing and improvement of county roads and bridges; * * *"

APPENDIX E

FORMULA FOR APPORTIONMENT OF STATE AID FOR EDUCATION

SOURCE:

INTERVENING COMPLAINT OF BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE, SECTION XXII.

"That by Public Chapter No. 14 enacted by the 1959 General Assembly, provision was made for the distribution of the taxes collected in support of the educational system of the State, whereby the pattern established in previous years by said unlawfully apportioned general assemblies has been continued by fixing first what purports to be a formula whereby each county's and city's ability to contribute to the education of the children therein is determined, and thereinafter exempting by proviso those over-represented counties from all application of the formula and guaranteeing to them school funds in the amounts previously had by such counties, despite their failure to contribute to their own educational systems on the basis required by said formula for the counties in which plaintiffs and other similarly situated live."

APPENDIX F

COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND TENNESSEE STATE CONSTITUTION, ARTICLE II, SECTION 5, IN 1951 TENNESSEE GENERAL ASSEMBLY

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE

Counties	Voting Population 1950*	Ratio	Number of Direct Representatives by Formula**	Actual Direct Representatives 1951
Cannon	5,341	.2672	0	1
Chester	6,391	.3198	0	1
Claiborne	12,799	.6404	0	1
Cocke	12,572	.6291	0	1
Crockett	9,676	.4842	0	1
DeKalb	6,984	.3495	0	1
Dickson	11,294	.5651	0	1
Gibson	48,132	1.4927	1	2
Hardin	16,908	.4792	0	1
Hickman	7,598	.3802	0	1
Jackson	6,719	.3362	0	1
Lake	6,252	.3128	0	1
McNairy	11,601	.5805	0	1
Madison	37,245	1.8636	1	2
Marion	10,998	.5503	0	1
Marshall	11,288	.5648	0	1
Monroe	12,884	.6447	0	1
Moore	2,340	.1171	0	1
Overton	9,474	.4740	0	1
Sevier	12,793	.6401	0	1
Smith	8,731	.4369	0	1
Stewart	5,238	.2621	0	1
White	9,244	.4625	0	1
		Total	2	25

These 23 counties have 23 *more* direct representatives than the Constitution's formula provides.

* *U.S. Census of Population: 1950*, Vol. II, *Characteristics of the Population*, Part 42, Tennessee, Chapter B, Table 42, pp. 92–97.

** Formula according to Art. II, Sec. 5, Tenn. State Constitution.

These 10 counties have 25 *less* direct representatives than the Constitution's formula provides.

Counties	Voting Population 1950*	Ratio	Number of Direct Representatives by Formula**	Actual Direct Representatives 1951
Anderson	33,990	1.7007	1	0
Bradley	18,273	.9143	1	0
Campbell	17,477	.8745	1	0
Carter	23,303	1.1660	1	0
Davidson	211,930	10.6043	10	6
Hamblen	14,090	.7050	1	0
Hamilton	131,971	6.6034	6	3
Knox	140,559	7.0331	7	3
Shelby	312,345	15.6287	15	7
Sullivan	55,712	2.7876	2	1
			45	20

$$\text{Ratio} = \frac{\text{County Voting Population} \times 99}{\text{Total Tennessee Voting Population}}$$

Total Tennessee Voting Population in 1950 was 1,978,548.

APPENDIX G

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-58 STATE GASOLINE AND MOTOR FUEL TAX PER REGISTERED VEHICLE, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE CONSTITUTION.

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	Motor Vehicle Registration 1957	Gasoline & Motor Fuel Tax Apportionment 1957–58	Apportionment per Vehicle	Amount if Apportioned Equally per Vehicle*
Cannon	3,220	$ 144,893	$45.00	$ 51,005
Chester	3,449	149,730	43.41	54,632
Claiborne	5,147	188,944	36.71	81,528
Cocke	7,237	184,050	25.43	114,634
Crockett	4,884	155,987	31.94	77,363
DeKalb	3,413	154,141	45.16	54,062
Dickson	6,873	183,741	26.73	108,868
Gibson	16,340	240,268	14.70	258,826
Hardin	5,555	194,385	34.99	87,991
Hickman	4,006	190,146	47.47	63,455

* $\frac{\text{Total Gasoline and Motor Fuel Tax}}{\text{Total Motor Vehicle Registration exclusive of trailers}} =$

average state aid per vehicle

for above 23 counties with *excess* of direct representatives:

$$\frac{\$4,091,408}{141,169} = \$28.98$$

for above 10 counties with *deficiency* of direct representatives:

$$\frac{\$3,741,648}{613,734} = \$\ 6.10$$

for all counties in the State:

$$\frac{\$19,142,240}{1,208,683} = \$15.84$$

Counties	Motor Vehicle Registration 1957	Gasoline & Motor Fuel Tax Apportionment 1957–58	Apportionment per Vehicle	Amount if Apportioned Equally per Vehicle*
Jackson	2,442	$ 156,252	$63.99	$ 38,681
Lake	3,389	139,389	41.13	53,682
McNairy	5,910	191,254	32.36	93,614
Madison	20,832	252,537	12.12	329,979
Marion	6,559	189,283	28.86	103,895
Marshall	7,052	169,840	24.08	111,704
Monroe	7,938	212,279	27.08	125,738
Moore	1,775	120,929	68.13	28,116
Overton	4,196	172,007	40.99	66,465
Sevier	8,362	203,931	24.39	132,454
Smith	4,622	158,577	34.31	73,212
Stewart	2,436	170,377	69.94	38,568
White	5,532	168,468	30.45	87,627
	141,169	$4,091,408		$2,236,099

Collectively these 23 counties receive 83.0% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

Collectively these 10 counties receive 159.8% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	28,335	$ 226,482	$ 9.71	$ 369,626
Bradley	14,766	186,659	12.64	233,893
Campbell	8,199	200,061	24.40	129,872
Carter	13,224	203,314	15.37	209,468
Davidson	138,233	630,958	4.56	2,189,611
Hamblen	12,377	155,823	12.59	196,052
Hamilton	80,391	471,544	5.87	1,273,393
Knox	84,929	486,355	5.73	1,345,275
Shelby	196,267	892,076	4.55	3,108,869
Sullivan	42,013	288,376	6.86	665,486
	613,734	$3,741,648		$9,721,545

APPENDIX H

COMPARISONS OF APPORTIONMENT OF 1957-1958 STATE AID FOR EDUCATION PER PUPIL IN AVERAGE DAILY ATTENDANCE FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF DIRECT REPRESENTATIVES ACCORDING TO 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION.

SOURCE: EXHIBIT 8, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	A.D.A. Pupils in County 1957–58	State Aid for Education 1957–58	State Aid per A.D.A. Pupil 1957–58	Amount if Distributed Equally According to A.D.A.*
Cannon	1,930	$ 326,345	$169.09	$ 250,707
Chester	2,041	359,344	176.06	265,126
Claiborne	4,874	775,104	159.03	633,133
Cocke	5,115	696,026	136.08	664,439
Crockett	3,962	623,803	157.45	514,664
DeKalb	2,163	373,391	172.63	280,974
Dickson	3,995	595,595	149.09	518,951
Gibson	9,621	1,388,383	144.31	1,249,768
Hardin	3,927	678,123	172.68	510,117
Hickman	2,488	406,737	163.48	323,191
Jackson	2,087	374,059	179.23	271,101
Lake	2,094	286,475	136.81	272,011
McNairy	4,677	775,233	165.75	607,542

* $\frac{\text{State Aid for Education}}{\text{Pupils in Average Daily Attendance}}$ = average State per A.D.A. Pupil

for above 23 counties with *excess* of direct representatives:

$$\frac{\$14,097,735}{92,595} = \$152.25$$

for above 10 counties with *deficiency* of direct representatives:

$$\frac{\$34,240,736}{318,457} = \$107.72$$

for all counties in the State:

$$\frac{\$90,229,362}{694,627} = \$129.90$$

Counties	A.D.A. Pupils in County 1957–58	State Aid for Education 1957–58	State Aid per A.D.A. Pupil 1957–58	Amount if Distributed Equally According to A.D.A.*
Madison	12,307	$ 1,591,829	$129.34	$1,598,679
Marion	5,091	649,931	129.95	649,630
Marshall	3,440	496,176	144.24	446,856
Monroe	5,580	816,941	146.41	724,842
Moore	780	171,957	220.46	101,322
Overton	3,321	599,156	180.41	431,398
Sevier	5,429	852,308	156.99	705,227
Smith	2,528	383,612	151.75	328,387
Stewart	1,750	360,403	205.94	227,325
White	3,485	516,834	148.30	452,702
	92,595	$14,097,735		$12,028,092

Collectively these 23 counties receive 17.21% more state aid than formula* would allow and have 23 more direct representatives than Constitution's formula provides.

These 10 counties collectively receive 20.81% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	7,638	$ 1,072,910	$140.47	$ 992,176
Bradley	7,760	951,561	122.62	1,008,024
Campbell	7,866	1,079,792	137.27	1,021,793
Carter	9,733	1,353,684	139.08	1,264,317
Davidson	60,566	6,118,723	101.03	7,867,523
Hamblen	6,194	830,033	134.01	804,601
Hamilton	43,599	4,640,955	106.45	5,663,510
Knox	45,062	4,943,717	109.71	5,853,554
Shelby	106,262	10,185,532	95.85	13,803,434
Sullivan	23,777	3,063,829	128.86	3,088,632
	318,457	$34,240,736		$41,367,565

APPENDIX I

Allocation of Federal Tax Money in Tennessee

Source:

Intervening Complaint of Ben West, Mayor, City of Nashville, Tennessee, Section XXII

The distribution formula contained in Tenn. Code Ann. § 54-403 is applied to those funds collected by the Federal Government for aid to State-maintained roads by means of Tenn. Code Ann. § 54-611 which states as follows:

"54-611. *Use, allocation and matching of federal funds —Formula.*—All funds provided for the federal aid secondary system of roads in this state by the federal aid secondary act of 1944 (Public Law 521, 78th Congress) and all amendments thereto and all funds hereafter allocated to said state system of rural roads by the commissioner of highways, with the approval of the governor, from funds apportioned for or made available to the department of highways under existing laws or laws which may hereafter be passed, shall be expended by said rural roads division for the establishment and construction of roads and bridges on said state systems of rural roads.

"The department of highways shall out of the funds allocated to the state system of rural roads first match the federal funds available under the federal aid secondary road program as now allocated to the various counties and the remainder of such funds so set aside and allocated to the state system of rural roads shall be expended in the various counties of the state upon the state system of rural roads by the same formula upon which the two cent (2¢) gasoline tax is at the present time allocated to the various counties."

APPENDIX J

Received for Entry 10:00 A.M. Jul 31, 1959.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION No. 2724

CHARLES W. BAKER, ET AL, PLAINTIFF,

v.

JOE C. CARR, SECRETARY OF STATE OF TENNESSEE, ET AL, DEFENDANTS

MEMORANDUM

It is urgently and ably insisted by defendants that the federal question sought to be made by the complaint is "obviously without merit" and that the Court under the doctrine of Ex Parte Poresky, 290 U.S. 30. should therefore dismiss the action without taking steps to constitute a court of three judges under 28 U.S. C. A. Section 2281.

Without undertaking a detailed resume of the allegations of the complaint, the short of the matter is that under the Constitution of Tennessee the members of the House of Representatives are limited to 99 in number and the members of the Senate to 33, and the legislature is directed at the expiration of each 10-year period after 1871 to make an enumeration of the qualified voters and to apportion the number of members of the legislature among the several counties or districts according to the number of qualified voters therein. Tenn. Constit. Art. 2, Secs 4, 5 and 6. However, according to the allegations of the bill, (accepted as true for the purposes of the present motion) these mandatory requirements of the State Constitution have been systematically and continuously violated and ignored by the Legislature of Tennessee. No reapportionment act has been passed since the Act of 1901, and even that act, the amended complaint alleges, was enacted without the enumeration of voters required by the Constitution of the State. As a result of changes in population the existing legislative

apportionment has become progressively discriminatory in character. The failure and refusal of the legislature to abide by plain and unequivocal provisions of the state Constitution have resulted in a debasement of the voting rights of large numbers of citizens as well as in a gross inequality of representation in the legislative councils of the state.

The plaintiffs, suing on their own behalf and on behalf of others similarly situated, reside in geographical areas which have suffered most from the discrimination. They invoke the Constitution of the United States, particularly the equal protection and due process clauses of the Fourteenth Amendment, contending that the legislature of Tennessee in failing to comply with the state Constitution has subjected them to an invidious discrimination that constitutes a denial of the equal protection of the law and a deprivation of due process of law.

The defendants, at this time at least, do not deny the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution. What they do say is that the question involved is exclusively of a political nature and does not present a justiciable controversy, with the result that the Court has no power or jurisdiction to intervene to grant any kind of relief.

The problem of legislative reapportionment has been before the courts on numerous occasions and it would serve no useful purpose to undertake at this time a survey or review of the many decisions on the question. There can be no doubt that generally speaking the courts have been reluctant to enter into an area that might bring them into collision with a coordinate branch of the government. This has resulted in many cases in creating a zone which is "off limits" to judicial authority, leaving a manifest wrong without a judicial remedy. Some courts refuse to intervene upon the ground that the controversy is of a peculiarly political nature, or, as otherwise expressed, is not a justiciable controversy, while the refusal to intervene in other opinions is pitched upon the theory that the courts should exercise their equity discretion to refuse to exercise jurisdiction in a controversy so fraught with political implications.

After a careful review of the allegations of the complaint in the light of the many authorities cited by counsel for

the respective parties, the Court has reached the conclusion that the issues presented are of such character that they should be evaluated and considered by a three-judge court as provided by statute and that this Court should not undertake to dismiss the complaint summarily. Notwithstanding some expressions in the cases which would indicate that there is no hope of judicial relief in a case of this type, the Court is not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration.

Possibly the leading decision of the Supreme Court of the United States upon the general question is Colegrove v. Green, 328 U.S. 549, in which the court sustained the dismissal of an action of qualified voters in certain Illinois Congressional districts to restrain the holding of elections under the provisions of an Illinois law governing such Congressional districts. It may be that the decision in this case closes the door to relief in the present case but the Court is not prepared to say that this conclusion necessarily follows or that it follows so clearly and distinctly that it is not even debatable. In that case seven justices of the Supreme Court heard the appeal. While a majority of four justices held that the action should be dismissed, it is significant that they disagreed as to the reasons for such dismissal, and that three of the justices dissented from the majority and expressed the view that the action should be sustained. Three of the justices in the majority were of the opinion that the question involved was so political in nature that the courts lacked jurisdiction and that the action should be dismissed for that reason. The other majority justice, while agreeing that the action should be dismissed, was of the opinion that the court had jurisdiction but that in the exercise of its discretion as a court of equity, it should decline to exercise such jurisdiction by intervening in a controversy having so many serious problems and complications. The three dissenting justices were of the opinion not only that the court had jurisdiction but that such jurisdiction should actually be exercised to enjoin the holding of the election under the Illinois Act. It is also worthy of note, as pointed out by Justice Frankfurter in his opinion, that the case could have been disposed of by affirming the dismissal on the authority of the prior decision in Wood v. Broom, 287 U.S. 1, holding that where the Congressional

Reapportionment Act did not contain a requirement as to the compactness, contiguity, and equality in population of districts, the state legislature in creating Congressional districts need not observe such requirement.

Whether Colegrove v. Green requires a dismissal of the present action is a question which could be fully considered and determined by a three-judge court. For present purposes it is enough to say that there are differences between that case and the present one that may ultimately prove to be significant. In the first place, Colegrove v. Green involved Congressional districts created by a state legislature under an Act of Congress which contained no requirement that the districts should be set up on the basis of equality or approximate equality of population. Consequently, in failing to redistrict, the legislature of Illinois did not violate any specific provision of its own Constitution or any specific provision of federal law requiring periodic redistricting upon the basis of equality. Further, in the Colegrove case there was ample power vested in Congress under the Federal Constitution to redistrict the state if the existing districts set up by state law had become inequitable. In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all.

McDougall v. Green, 335 U.S. 281, another Supreme Court case cited by defendants as requiring dismissal of the present action, was disposed of by the Court in a brief per curiam opinion, but as this Court construes the opinion, the questions here presented were not reached. It is apparent that the court was of the opinion and actually held that the Illinois law attacked in that case did not constitute a denial of the equal protection of the law and did not deprive the plaintiffs of due process of law. It was stated in the opinion that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality". In short, the court held that there was no violation of federal law established, and consequently it was not necessary for the court to decide whether it had power or jurisdiction to grant relief if the violation of federal law had been made to appear. Three

justices dissented from the majority, being of the view that the state law constituted a violation of the equal protection clause of the Fourteenth Amendment and that the court should declare the law void. Mr. Justice Rutledge, as in Colegrove v. Green, concurred in dismissing the action but expressed the opinion that a violation of the Fourteenth Amendment was shown, and that the dismissal should be based upon the discretionary right of a court of equity to refuse to entertain jurisdiction.

In South v. Peters, 339 U.S. 276, the court refused to enjoin adherence in the forthcoming primary to the statute of Georgia prescribing the county unit system. Again in a brief per curiam opinion, the action of the district court in dismissing the action was affirmed, but it is not clear from the opinion whether the refusal to intervene is based upon a lack of jurisdiction or upon the ground that equitable relief should be refused under the particular circumstances of the case. This decision also was by a divided court, two justices believing that the relief should be granted.

A careful reading of the opinion of the Supreme Court of Tennessee in Kidd v. McCanless, 200 Tenn. 273, involving the same laws of Tennessee as the instant case, reveals that the fundamental basis of the decision was the court's opinion that relief could not be granted without completely disrupting, if not destroying, the government of the state. After finding that the de facto doctrine could not be applied and that if the Reapportionment Act was declared unconstitutional the state would be deprived of a legislature, the court held under such circumstances that a declaration of unconstitutionality should be withheld. Thus, the opinion would appear to stand for the proposition that the courts should refuse to intervene in the exercise of a proper discretion in given circumstances, and not for the proposition that jurisdiction does not exist or is completely wanting in such cases. The Supreme Court of the United States simply dismissed the appeal (352 U.S. 920) without comment, citing Colegrove v. Green, supra. The fair inference is that the Supreme Court concurred in the finding of the Tennessee Court that Equitable relief should be denied in a case where to grant such relief the government of the state would be disrupted or thrown into chaos and confusion.

From this brief review of some of the more frequently cited decisions of the Supreme Court, it would appear to be at least debatable whether that court has foreclosed the

question in all cases of legislative reapportionment. It can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention. If the issues are not conclusively settled against the plaintiffs by prior Supreme Court decisions, as to which the Court presently expresses no opinion, the questions of jurisdiction and the propriety of exercising or withholding it, would have to be decided in the light of all relevant factors, including a consideration of the fundamental principle of separation of powers, the desirability of avoiding conflicts with other branches of the government, the delicacy of the relationship existing between the federal and state governments, the possibility of the disruption of the governmental affairs of the state, the nature of the rights claimed by the plaintiffs, the degree and extent to which these rights have been violated, and the ability or inability of the courts to grant effective relief. If it should be assumed that jurisdiction does exist, it would appear that the courts should hesitate to dismiss actions of this character hastily or summarily, especially where a violation of individual constitutional rights is clearly established. Under such circumstances a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen.

Believing that the questions presented should be considered by a court of three judges, the Court has, pursuant to 28 U.S.C.A. Section 2284, notified the Chief Judge of The Sixth Circuit of the pendency of the action and the ruling of the Court herein denying the motion to dismiss. This will result in the constitution of a court of three judges under 28 U.S.C.A. Section 2281.

/s/ William E. Miller,
United States District Judge.

APPENDIX K

Source: *Baker, et al.* v. *Carr, et al.*, Complaint, Exhibit A

TENNESSEE COUNTIES:

	1900 Voting Population	1950 Voting Population		1900 Voting Population	1950 Voting Population
Anderson	4,066	33,990	Lake	1,972	6,252
Bedford	5,777	14,732	Lauderdale	5,075	14,413
Benton	2,712	7,023	Lawrence	3,103	15,847
Bledsoe	1,490	4,198	Lewis	866	3,413
Blount	4,359	30,353	Lincoln	6,239	15,092
Bradley	3,687	18,273	Loudon	2,467	13,264
Campbell	3,976	17,477	McMinn	4,278	18,347
Cannon	2,781	5,341	McNairy	4,060	11,601
Carroll	5,804	16,472	Macon	2,938	7,974
Carter	3,748	23,303	Madison	8,756	37,245
Cheatham	2,467	5,263	Marion	4,066	10,998
Chester	2,372	6,391	Marshall	4,591	11,288
Claiborne	4,559	12,799	Maury	11,286	24,556
Clay	1,853	4,528	Meigs	1,604	3,039
Cocke	4,072	12,572	Monroe	4,065	12,884
Coffee	3,720	13,406	Montgomery	8,712	26,284
Crockett	3,556	9,676	Moore	1,333	2,340
Cumberland	2,237	9,593	Morgan	2,544	8,308
Davidson	17,906	211,930	Obion	7,173	18,434
Decatur	2,356	5,563	Overton	2,925	9,474
Dekalb	3,656	6,984	Perry	1,957	3,711
Dickson	4,402	11,294	Pickett	1,135	2,565
Dyer	5,935	20,062	Polk	2,679	7,339
Fayette	6,180	13,577	Putnam	3,679	17,071
Fentress	1,331	7,057	Rhea	3,405	8,937
Franklin	4,686	14,297	Roane	5,470	17,639
Gibson	9,206	29,832	Robertson	6,274	16,456
Giles	7,565	15,935	Rutherford	7,677	25,316
Grainger	3,676	7,125	Scott	2,378	8,417
Greene	6,967	23,649	Sequatchie	766	2,904
Grundy	1,737	6,540	Sevier	4,434	12,793
Hamblen	2,997	14,090	Shelby	43,843	312,345
Hamilton	16,892	131,971	Smith	4,372	8,731
Hancock	2,274	4,710	Stewart	3,512	5,238
Hardeman	5,119	13,565	Sullivan	6,059	55,712
Hardin	4,357	9,577	Sumner	6,394	20,143
Hawkins	5,192	16,900	Tipton	6,970	15,944
Haywood	5,447	13,934	Trousdale	1,482	3,351
Henderson	4,050	10,199	Unicoi	1,320	8,787
Henry	5,873	15,465	Union	2,841	4,600
Hickman	3,891	7,598	Van Buren	700	2,039
Houston	1,545	3,084	Warren	3,864	13,337
Humphreys	3,203	6,588	Washington	5,408	36,967
Jackson	3,178	6,719	Wayne	2,974	7,176
James	1,281	.....	Weakley	7,862	18,007
Jefferson	4,130	11,359	White	3,118	9,244
Johnson	2,211	6,649	Williamson	6,271	14,064
Knox	19,049	140,559	Wilson	6,550	16,459

APPENDIX L

REPRESENTATIVE TENNESSEE SENATORIAL DISTRICTS IN 1901 AND 1951, BY COUNTIES AND VOTING POPULATION IN 1900 AND 1950

SOURCE: EXHIBIT 7, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Senatorial District Number	Counties	Total Voting Population 1900	Voting Population per Senator 1900	Total Voting Population 1950	Voting Population per Senator 1950
1	Carter	3,748		23,303	
	Greene	6,967		23,649	
	Johnson	2,211		6,649	
	Unicoi	1,320		8,787	
	Washington	5,408		36,967	
			19,654		99,355
2	Hawkins	5,192		16,900	
	Sullivan	6,059		55,712	
			11,251		72,612
4	Blount	4,359		30,353	
	Cocke	4,072		12,572	
	Hamblen	2,997		14,090	
	Jefferson	4,130		11,359	
	Sevier	4,434		12,793	
			19,992		81,167
8	Hamilton	16,892		131,971	
			16,892		131,971
11	Franklin	4,686		14,297	
	Grundy	1,737		6,540	
	Marion	4,066		10,998	
	Warren	3,804		13,337	
			14,293		45,172
16	Davidson	33,311		211,930	
			16,656		105,965
17	Davidson	33,311		211,930	
			16,656		105,665

Senatorial District Number	Counties	Total Voting Population 1900	Voting Population per Senator 1900	Total Voting Population 1950	Voting Population per Senator 1950
20	Lewis	1,075		3,413	
	Maury	11,286		24,556	
	Perry	1,957		3,711	
			14,318		31,680
22	Giles	7,565		15,935	
	Lawrence	3,730		15,847	
	Wayne	2,974		7,176	
			14,269		38,958
25	Chester	2,372		6,391	
	Henderson	4,050		10,199	
	Madison	8,756		37,245	
			15,178		53,835
28	Lake	1,972		6,252	
	Obion	7,173		18,444	
	Weakley	7,862		18,007	
			17,007		42,703
32	Shelby	43,843		312,345	
			16,938**		109,430**

** In cases where a county has both a direct and floaterial senator, the sum of the voting population of all the counties in such floaterial district is divided by the number of direct and floaterial districts involved to determine the average population for each district.

NOTE: Assuming the thirty-three senators are apportioned only on the basis of the voting population. in 1900 each district should have a population of 14,769 and in 1950 a population of 59,956. Using the above assumptions the results of the 1901 and the 1951 Senate apportionment follows below.

	Districts having less than 90% of the Required Population (Over Represented)	Districts having more than 110% of the Required Population (Under Represented)
1900	10	12
1950	19	11

APPENDIX M

COMPARISONS OF APPORTIONMENT OF 2¢ OF THE 7¢ 1957-1958 STATE GASOLINE AND MOTOR FUEL TAX PER CAPITA, FOR COUNTIES WITH AN EXCESS OR A DEFICIENCY OF [illegible] ECT REPRESENTATIVES ACCORDING TO THE 1950 VOTING POPULATION AND ARTICLE II, SECTION 5 OF THE TENNESSEE STATE CONSTITUTION

SOURCE: EXHIBIT 9, AMENDMENT AND SUPPLEMENT TO THE INTERVENING PETITION FILED BY THE PLAINTIFF, BEN WEST, MAYOR, CITY OF NASHVILLE, TENNESSEE.

Counties	County Population 1950	Gasoline and Motor Fuel Tax Apportionment 1957–1958	Apportionment Per Capita	Amount if Apportioned Equally Per Capita*
Cannon	9,174	$ 144,893	$15.79	$ 53,393
Chester	11,149	149,730	13.43	64,887
Claiborne	24,788	188,944	6.80	144,266
Cocke	22,991	184,050	8.01	133,808
Crockett	16,624	155,987	9.38	96,752
DeKalb	11,680	154,141	13.20	67,978
Dickson	18,805	183,741	9.77	109,445
Gibson	48,132	240,268	4.99	280,128
Hardin	16,908	194,385	11.50	98,405
Hickman	13,353	190,146	14.24	77,714
Jackson	12,348	156,252	12.65	71,865
Lake	11,655	139,389	11.96	67,832
McNairy	20,390	191,254	9.38	118,670

*$\frac{\text{Total Gasoline \& Motor Fuel Tax}}{\text{Total State Population 1950}}$ = average state aid per capita.

for above counties with *excess* of direct representatives:

$$\frac{\$4,091,408}{445,292} = \$9.19$$

for above 10 counties with deficiency of direct representatives:

$$\frac{\$3,741,648}{1,522,998} = \$2.46$$

for all counties in the State: $\frac{\$19,142,240}{3,291,718} = \$5.82$

Counties	County Population 1950	Gasoline and Motor Fuel Tax Apportionment 1957–1958	Apportionment Per Capita	Amount if Apportioned Equally Per Capita*
Madison	60,128	$252,537	$ 4.20	$349,951
Marion	20,520	189,283	9.22	119,426
Marshall	17,768	169,849	9.56	103,410
Monroe	24,513	212,279	8.66	142,666
Moore	3,948	120,929	30.63	22,977
Overton	17,566	172,007	9.79	102,234
Sevier	23,375	203,931	8.72	136,043
Smith	14,098	158,577	11.25	82,050
Stewar	9,175	170,377	18.57	53,399
White	16,204	168,468	10.40	94,307
	445,292	$4,091,408		$2,591,606

Collectively these 23 counties receive 57.9% more state aid than formula* would allow and have 23 more direct representatives that Constitution's formula provides.

Collectively these 10 counties receive 136.9% less state aid than formula* would allow and have 25 less direct representatives than Constitution's formula provides.

Anderson	59,407	$226,482	$3.81	$345,749
Bradley	32,338	186,659	5.77	188,207
Campbell	34,369	200,061	5.82	200,028
Carter	42,432	203,314	4.79	246,954
Davidson	321,758	630,958	1.96	1,872,632
Hamblen	23,976	155,823	6.50	139,540
Hamilton	208,255	471,544	2.26	1,212,044
Knox	223,007	486,355	2.18	1,297,901
Shelby	482,393	892,076	1.85	2,807,527
Sullivan	95,063	288,376	3.03	553,267
	1,522,998	$3,741,648		$8,863,849

APPENDIX N

28 U.S.C. §1343:

"*Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"*Proceeding in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their

civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

ADDENDUM

APPENDIX O

TENN. CONST., art. I § 5 (1870):

Sec. 5 *Elections to be free and equal; right of suffrage declared.*—That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

TENN. CONST., art. II, §§ 4, 5 and 6 (1870):

Sec. 4 *Census.*—An enumeration of the qualified voters, and an apportionment of the representatives in the general assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5 *Apportionment of representatives.*—The number of representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the state shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6 *Apportionment of senators.*—The number of senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the house of representatives, shall be made up to such county or counties in the senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

TENN. CONST., art. XI, § 3 (1870):

Sec. 3 *Amendments to the constitution, etc.; not oftener than once in six years; but legislature may at any time submit question of calling convention.*—Any amendment or amendments to this constitution may be proposed in the senate or house of representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the general assembly then next to be chosen, and shall be published six months previous to the time of making such choice; and if in the general assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people, in such manner and at such time as the general assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for representatives, voting in their favor, such amendment or amendments shall become part of this constitution. When any amendment or amendments to the constitution shall be proposed in pursuance of the foregoing provisions the same shall at each of said sessions be read three times on three several days in each house. The legislature shall not propose amendments to the constitution oftener than once in six years. The legislature shall have the right, at any time by law, to submit to the people the question of calling a convention to alter, reform or abolish this constitution, and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the convention shall assemble in such mode and manner as shall be prescribed.